INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 852

FRED REYNOLDS AND JOHN PERCY REYNOLDS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 94) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 21, 1945 (R. 96), and a petition for rehearing was denied January 16, 1946 (R. 102). The petition for a writ of certiorari was filed February 15, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Febru-

ary 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether an indictment under the National Stolen Property Act must specifically negative defendant's ownership or right to possession of the property alleged to have been transported in interstate commerce in violation of the Act.

2. Whether the trial court committed error in excluding O. P. A. Maximum Price Regulation 429, as amended, from evidence as not relevant to a determination for jurisdictional purposes of the value of the slot machines alleged to have been transported.

STATUTE INVOLVED

The National Stolen Property Act of May 22, 1934, c. 333, 48 Stat. 794–795, as amended by the Act of August 3, 1939, c. 413, 53 Stat. 1178–1179, provides in pertinent part:

> SEC. 3 (18 U. S. C. 415). Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, * * * shall be punished by a fine of not

more than $10,000 or by imprisonment for not more than ten years, or both: * * *.

SEC. 5 (18 U. S. C. 417). In the event that a defendant is charged in the same indictment with two or more violations of this Act, then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of sections 3 and 4 hereof, * * *.

STATEMENT

An indictment in five counts was returned against petitioners charging them with transporting and causing the transportation of stolen slot machines in interstate commerce, knowing the machines to have been stolen, and with conspiracy (R. 1–6). Petitioners were found guilty on all counts and each was sentenced generally to pay a fine of $1,000 and to imprisonment for one year and one day (R. 11–14). On appeal to the Circuit Court of Appeals for the Fifth Circuit, the convictions were affirmed (R. 96).

The evidence may be summarized as follows:

On October 4, 1943, Alabama law enforcement officers under authority of a search warrant seized approximately one hundred slot machines from the premises of petitioner Fred Reynolds at Flomaton, Alabama (R. 63–64). The machines were turned over to the county sheriff, who stored them in a locked and barred room in the courthouse at Brewton, Alabama (R. 64). Pursuant

to Alabama statutes, the circuit solicitor a few days later filed a petition for the condemnation of these machines (R. 29–36), and gave notice to Fred Reynolds (R. 36, 45). Shortly after service of notice of this petition for condemnation, the room in which the slot machines were locked was broken into and the machines stolen (R. 45–46).

About February 1, 1944, one George Gray, a slot machine operator from Mobile, Alabama, purchased fifty-five of these machines for $3,640 (R. 42, 46–47). The machines were at that time stored at the house of petitioner John Percy Reynolds in Flomaton, Florida, to whom the money was paid. Fred Reynolds took Gray to that house and both petitioners assisted in loading the machines on to Gray's truck. About one week later these fifty-five machines were sold in New Orleans, Louisiana, for $7,000. (R. 48–49.) On a later occasion, in March, Gray returned to Flomaton, Florida, and purchased twenty-eight more of the machines from petitioners, which were later resold in Mobile for $3,680 (R. 43, 50).

In February 1944, Fred Reynolds made a trip to Jackson, Mississippi, to interest one Grady Allen in the purchase of slot machines. Late in March 1944, following instructions of John Percy Reynolds, Allen drove to Flomaton, Florida, where he met petitioners and purchased five of the machines for $1,000. He was returning to Mississippi with the machines when apprehended in Alabama. (R. 53–54.)

Others of the stolen machines were found on the premises of John Percy Reynolds in Flomaton, Florida, when these premises were searched at the time of the apprehension of petitioners (R. 57).

When the machines were originally impounded by the Sheriff of Escambia County, Alabama, each was identifiable by a serial number stamped in the metal parts of the machine, and a record was made of these numbers (R. 64). When ultimately recovered, the numbers were found to have been filed off. However, the machines were identified through laboratory treatment which brought out the numbers on the metal. (See R. 62, 64, 67–68.) The evidence of identification of the machines, the transportation, and sales described above, is not disputed.

ARGUMENT

1. Petitioners urge (Pet. 9–10; Br. 7–10) that an indictment under the National Stolen Property Act must negative ownership or right to possession in the defendant to state an offense, and they cite federal and state decisions involving the crimes of larceny or burglary in support of their contention. These authorities are inapplicable to an indictment under the Act. The gist of the offense here is not larceny but rather interstate transportation. Under comparable federal statutes, it has been uniformly held that it is unnecessary to lay ownership in the indictment where the

offense charged is one affecting interstate commerce. Thus, under 18 U. S. C. 409, which makes it an offense to commit larceny of any freight or express shipment in interstate commerce, or to receive or possess any goods knowing them to have been stolen from any such shipment, the federal courts have consistently denied the necessity as against persons charged with having possession of or receiving such goods to lay ownership in the indictment. *Hadsell* v. *United States,* 8 F. 2d 989 (C. C. A. 9), certiorari denied, 270 U. S. 656; *Falgout* v. *United States,* 279 Fed. 513 (C. C. A. 5); *Cohen* v. *United States,* 277 Fed. 771 (C. C. A. 7), certiorari denied, 257 U. S. 657; *Grandi* v. *United States,* 262 Fed. 123 (C. C. A. 6). The decisions are the same with respect to persons indicted for possessing property stolen from the United States mails. *Johnston* v. *United States,* 22 F. 2d 1 (C. C. A. 9), certiorari denied, 276 U. S. 637; *Poffenbarger* v. *United States,* 20 F. 2d 42 (C. C. A. 8); *Collins* v. *United States,* 20 F. 2d 574 (C. C. A. 8); *United States* v. *Falkenhainer,* 21 Fed. 624 (C. C. E. D. Mo.); *United States* v. *Trosper,* 127 Fed. 476 (S. D. Cal.). Under the National Motor Vehicle Theft Act (18 U. S. C. 408), which in construction is almost identical with the National Stolen Property Act and out of which the latter grew, the courts have similarly not required indictments to set forth any details of the theft, including identification of ownership. *Fos-*

ter v. *United States,* 4 F. 2d 107 (C. C. A. 9); *Whitaker* v. *United States,* 5 F. 2d 546 (C. C. A. 9), certiorari denied, 269 U. S. 569; *Jones* v. *United States,* 19 F. 2d 316 (C. C. A. 8); *Wendell* v. *United States,* 34 F. 2d 92 (C. C. A. 4).

It is an established principle of federal criminal procedure that where a statute fully, directly, and expressly, without any uncertainty or ambiguity, sets forth all the elements of an offense, an indictment is sufficient which charges the offense substantially in the language of the statute. *Peters* v. *United States,* 94 Fed. 127 (C. C. A. 9), certiorari denied, 176 U. S. 684; *Dierkes* v. *United States,* 274 Fed. 75 (C. C. A. 6), certiorari denied, 257 U. S. 646; *Bloch* v. *United States,* 261 Fed. 321 (C. C. A. 5), certiorari denied, 253 U. S. 484; *Knoll* v. *United States,* 26 App. D. C. 457, certiorari denied, 201 U. S. 643; *United States* v. *Henderson,* 121 F. 2d 75 (App. D. C.); *Dunne* v. *United States,* 138 F. 2d 137 (C. C. A. 8), certiorari denied, 320 U. S. 790. The only exception to this rule is where the statute is so general in its language that an indictment in its terms would not sufficiently apprise a defendant of the charges against him. But such is not the case here; the indictment contained the essential averments of the elements of the offense as defined by statute, and it gave petitioners sufficient information to meet the charge. *Hadsell* v. *United States, supra; Cohen* v. *United States, supra; Pines* v. *United*

States, 123 F. 2d 825 (C. C. A. 8). If, as petitioners argue, the indictment left open the possibility that they owned the slot machines in question, that was a fact of which they would have the best knowledge and could have been offered by way of defense. *Taylor* v. *United States,* 142 F. 2d 808 (C. C. A. 9), certiorari denied, 323 U. S. 723. Furthermore, had petitioners really needed information as to ownership, it could have been obtained by a bill of particulars which they were in effect invited to request by the trial court in its order overruling their demurrers (R. 10–11), but which they, for obvious reasons, found unnecessary.

2. Petitioners assert (Pet. 10–11; Br. 11–16) that O. P. A. Maximum Price Regulation No. 429 (ceiling prices for certain types of used consumer durable goods) was applicable to determine the value of the slot machines in question; that slot machines are included within subsection 1 (o) of that regulation covering various types of coin operated machines; and that therefore the trial court erred in refusing to admit the regulation in evidence (see R. 89).[1] Petitioners cite authorities to show the applicability of O. P. A. price regulations to the determination of price in sales by public agencies as well as by private individuals. Those authorities, however, have no bear-

[1] Maximum Price Regulation No. 429, as amended, is set forth in full at pages 73–89 of the record.

ing upon the question in this case whether the particular O. P. A. regulation was relevant to a determination of the value—not price—of particular commodities.

In the first place, subsection 1 (o) of Maximum Price Regulation No. 429 does not cover slot machines. The specific types of coin operated machines mentioned in the subsection—cigarette, candy, beverage, juke box and pin ball machines—are generically distinct from slot machines. The phrase "other amusement machines" was obviously intended only to cover machines of similar character or purpose, i. e., those whose primary function is to vend some commodity or for amusement. Slot machines, however, are solely intended for gambling purposes; they vend nothing, and amusement *per se* is only an incidental purpose. If the regulation had been intended to cover devices the sole purpose of which was for gambling, it could easily have been more artfully drafted to this end by employing accepted phraseology such as "gaming devices." The omission makes it clear that there was no intention to cover such devices, and this is the more clear in view of the fact that they are outlawed in most states.

Secondly, the inapplicability of the O. P. A. regulation to a determination of the value of the slot machines is confirmed by the terms of the regulation as a whole. It does not, as petitioners repeatedly assert (see Pet. 12, 14), *per se* fix prices for

the commodities covered. It merely establishes criteria by which a particular seller may arrive at his ceiling price.[2] By none of the criteria could a price have been arrived at for the slot machines here, because of the absence of a legal or open market for the machines. The only rule under the regulation by which it might be urged a price could have been ascertained is rule 6, under which the seller goes to the Office of Price Administration for information as to how to determine a price (see note 2, p. 11, *infra*). Obviously, it would be ridiculous to assume that the Office of Price Administration would assist a seller in arriving at a price for traffic in a commodity which was outlawed in the community.

---

[2] The Regulation provides, in pertinent part (R. 80–81):

"SEC. 6. How to find the price of the new article.

You find the price of the new article by using these rules in the order in which they appear:

(a) Rule 1. Find the retail selling price of the same article, new, for sale in your own stock.

(b) Rule 2. If you do not have the same article, new, in stock, find the retail selling price of a similar article, new, in your own stock. A used article is "similar" to a new article if the used article has the same uses and when new would give fairly equivalent service. In addition, the used article, when new, must have sold for approximately the same price as the similar new article now sells for.

(c) Rule 3. If you do not have a similar article, new, in stock, find the retail selling price of the same article, new, in the same shopping area. (The shopping area is the area in which persons in your community shop for new goods of the kind you are pricing.)

(d) Rule 4. If the same article, new is not for sale in the same shopping area, find the retail selling price of a similar

The regulation as such, therefore, would have availed petitioners nothing in establishing a ceiling price for the slot machines. And there was no offer by petitioners of any supporting evidence to demonstrate the applicability of the regulation to a determination of value as such. In this respect, petitioners' argument is further defective, since the value of a commodity is not necessarily its ceiling price, even if the latter is ascertainable. O. P. A. ceiling prices govern only sales, and the value of commodities for other purposes is determined by other direct and relevant standards. *Tierney* v. *General Exchange Ins. Corp.*, 60 F. Supp. 331 (N. D. Texas); *Fugate* v. *State*, 158 Pac. 2d 177 (Cr. Ct. of App. Okla.). All of the testimony in the instant case shows that petitioners and other parties with whom they dealt set a value on the slot machines far in excess of the minimum value fixed in the National Stolen Property Act for jurisdictional purposes.

---

article, new, for sale in the same shopping area. A used article is "similar" to a new article if the used article has the same use and when new would give fairly equivalent service. In addition the used article, when new, must have sold for approximately the same price as the similar article now sells for.

(e) Rule 5. If the same or similar article is not being sold in your community, find the retail selling price when this article was last sold in your community.

(f) Rule 6. If you cannot find the retail selling price under any of these Rules above, apply to the appropriate Office of Price Administration District Office, for information on how to determine your price."

CONCLUSION

The decision below is correct, and there is involved no question of importance or conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

MARCH 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946